STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RICHARD BRUCE PETUSH, a/k/a BRUCE RICHARD PETUSH,

Defendant-Appellant.

UNPUBLISHED
October 8, 2002

No. 235561
Lenawee Circuit Court
LC No. 01-009142-FH

Before: Meter, P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC II), MCL 750.520b(1)(c), and was sentenced to 15 to 30 years' imprisonment. Defendant appeals as of right. We affirm.

I. Sentencing

Defendant argues that he must be resentenced because the trial court's reasons for departing from the legislative sentencing guidelines' recommendation were not substantial and compelling. We review for an abuse of discretion a trial court's determination that objective and verifiable departure factors are substantial and compelling. *People v Babcock (Babock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). Objective and verifiable factors are "external to the minds" of the parties involved in the sentencing decision and "capable of being confirmed." *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995). To be substantial and compelling, objective and verifiable factors (1) must not already be reflected in the guidelines "unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight," MCL 769.34(3)(b), and (2) must keenly or irresistibly grab the court's attention, and be of considerable worth in deciding the length of a sentence. *Babcock, supra* at 75.

Here, the trial court gave two reasons for departing upward: (1) defendant was an "uncontrollable pedophile" who would, if not confined, sexually assault other children, and (2) defendant would, in prison, receive "psychological, substance, and any other treatment needed in an atmosphere which, first and foremost, will protect society." Defendant had two prior convictions for sexual contact with children and, as a result, had been out of prison a total of only

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

four years since his first offense in 1976. Therefore, the court's conclusions that defendant was a pedophile in the everyday sense of that word, see *Random House Webster's College Dictionary* (2000), p 976 (defining pedophilia as "sexual desire in an adult for a child"), and that his pedophilia was uncontrollable, were objective and verifiable. *Fields, supra* at 66. The court's further conclusion that extended incarceration would protect other children as well as give defendant "psychological, substance abuse, and any other treatment" was also based on defendant's history of recurrent offenses, and therefore was also objective and verifiable. *Id.* An uncontrollable sexual attraction toward young boys has been recognized as a factor not adequately considered by the legislative sentencing guidelines, as has the need to protect children from someone so attracted. *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). Because these two factors keenly and irresistibly grabbed the court's attention as matters of considerable worth in fashioning defendant's sentence, they were substantial and compelling, and the court did not abuse its discretion in departing from the guidelines. *Babcock, supra* at 75.

II. Sufficiency of evidence

Defendant also says that there is insufficient evidence to support his conviction. The Court reviews this issue de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could have supported a finding by a rational factfinder that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

The elements of CSC II in this case were (1) that defendant made the victim touch his genital area by placing that genital area in contact with the boy's body, (2) that this was done, or could reasonably be construed as having been done, for sexual purposes, and (3) that the victim was under thirteen years of age when it occurred. CJI2d 20.2, 20.3. The victim clearly testified that defendant rubbed his genitalia on the victim's leg while they were both sleeping in defendant's bed. Defendant stated that this touching, if it occurred, was inadvertent and the result of a dog jumping on the bed. It was the province of the jurors to determine the weight and credibility to be given to the victim's and defendant's conflicting testimony, *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and this Court's review should not disturb that determination. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The victim's testimony alone, if believed, was sufficient for the jury to find the first two elements of CSC II beyond a reasonable doubt, *People v Taylor*, 18 Mich App 381, 384-385; 171 NW2d 219 (1969), and the testimony of the victim's mother regarding his age was sufficient for the jury to find the third element. Therefore, the jury's verdict was supported by sufficient evidence. *Herndon, supra* at 415.

III. Ineffective assistance of counsel

Finally, defendant raises a claim of ineffective assistance of counsel. Whether an attorney failed to provide effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, but questions of constitutional law are reviewed de novo. *Id.* To prevail on a claim that counsel was ineffective, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the attendant

proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). There is a strong presumption that counsel's assistance was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Decisions regarding the choice and presentation of evidence and the calling or questioning of witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The same is true of decisions regarding objections. *Stanaway, supra* at 687. In general, this Court will not second-guess a counsel's judgment on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Before the case was sent to the jury, the court granted defendant's motion to strike one count of second-degree criminal sexual conduct because there was no evidence presented to support this count. The victim had told police that defendant had touched his private area. However, at trial, he denied that this had happened. Defendant claims that counsel was ineffective because counsel failed (1) to object that the jury was not informed why one second-degree criminal sexual conduct count was dismissed and to move for a directed verdict on this count (2) to cross-examine the victim regarding his prior inconsistent statement that defendant *had* touched his genitals, (3) to object when the prosecutor failed to challenge the victim under MRE 607(2)(c) with respect to his inconsistent statements.

Counsel's decision not to impeach the victim or to object when the prosecutor elected not to do so could have been both an effort to avoid the appearance of attacking the victim and a desire not to give him the opportunity to revert to his original story. Further, counsel's decision not to highlight the change in the information or to move for a directed verdict could have been an attempt to avoid reinforcing the image of the alleged event in the jurors' minds. Therefore, defendant fails to rebut the presumption of sound trial strategy that attaches to a counsel's decisions regarding appropriate questioning and argument. See *Rockey, supra* at 76; *Stanaway, supra* at 687.

Next, defendant contends that counsel erred by failing to object to overcharging in the information. Defendant's argument is that he should have initially been charged only with one count of touching the victim's genitals because that was the way the police characterized the victim's allegation, and that if he had been accurately charged, he would have been entitled to a directed verdict when the victim recanted this accusation. What this argument overlooks, however, is that both counts in the information were identical, and neither made a distinction between defendant touching the victim's genitals or defendant's genitals touching the victim. Even if one of the counts had been stricken earlier in the trial, defendant still would not have been entitled to a directed verdict because the victim's and his mother's testimony would still have been sufficient to support a guilty verdict. *Taylor, supra* at 384-385; *Lemmon, supra* at 642. Therefore, it made no difference that defendant's counsel did not move to strike one count of the information earlier, and it would have been futile for counsel to move for a directed verdict. Counsel cannot be considered ineffective for failure to advocate a futile or meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant contends that counsel erred in failing to object to misconduct in the judge's and the prosecution's questioning of the victim. We disagree. Counsel was pursuing sound trial strategy when she chose not to object to various questions posed by the judge and the prosecution because, while challenges might have changed the form of the questions, we are not convinced they would have changed the answers. *Stanaway, supra* at 687. Moreover,

prosecutorial misconduct cannot be based on a good faith effort to admit evidence, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, there is nothing indicating that the prosecutor acted in bad faith with respect to questioning the victim, so counsel did not err in failing to object. Defendant also contends that counsel should have objected because the prosecutor had a police officer interview the victim again on the morning of the trial. However, defendant cites no authority for the impropriety of this action. An appellant may not just announce a position and leave it to this Court to discover and rationalize its basis. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns